Filed 2/4/05 P. v. Solorio CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOSE SOLORIO, Defendant and Appellant.	H025573 (Monterey County Super. Ct. No. SS021093)

A. INTRODUCTION

This case arises from an exchange of gunfire between rival gangs on March 11, 2002. An eight-year-old boy, who was passing by with his friends at the time, was inadvertently shot in the back. Defendant Jose Solorio was one of the people involved in the shooting. A jury convicted him of five counts of attempted murder (Pen. Code, §§ 187, subd. (a), 664)[1] and one count of actively participating in a criminal street gang (§ 186.22, subd. (a)). He was sentenced to 47 years to life in state prison.

On appeal, defendant contends that the trial court made multiple instructional errors and that there is insufficient evidence to support the attempted murder convictions. By supplemental brief defendant also argues that the trial court erred under *Blakely v. Washington* (2004) __ U.S. __ [124 S.Ct. 2531] (*Blakely*) by imposing the aggravated term for three counts. We reject these contentions.

[1] Hereafter, all undesignated statutory references are to the Penal Code.

We do find merit in defendant's argument that in the context of this case, where there were five alleged victims, one of whom was an uninvolved bystander, the instruction that defendant must have had the "specific intent to kill, unlawfully, *another human being*," (italics added) was ambiguous. The instruction could have improperly allowed the jury to convict defendant of attempted murder on a theory of transferred intent. (See *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*).) The error was prejudicial, however, only with respect to one of the attempted murder convictions.

Defendant also contends and we agree in part, that the trial court erred in applying certain sentence enhancements.

We shall reverse with instructions as specified herein.

B. FACTS

1. The Participants' Account of the Shooting

Witnesses Daniel M. and Eduardo S. were involved, on opposite sides, in the shooting that took place on March 11, 2002. Both had been charged in connection with the incident and testified pursuant to their plea agreements. Defendant and 15-year-old Daniel M. were affiliated with the Norteño gang. Eduardo S. was affiliated with the rival Sureño gang.

According to Daniel M., at around 3:00 or 4:00 in the afternoon of March 11, 2002, he and defendant were walking around with another friend when they encountered two persons associated with the Sureño gang--Eric Alvarado and Luis Valerio. Daniel M. confronted Alvarado to provoke a fight. Alvarado backed away, pulled out a gun, aimed it straight at Daniel M., and pulled the trigger. The gun did not fire and Alvarado remarked in Spanish that the gun was not loaded.

Defendant's group ran away to Daniel M.'s house where Daniel M. took his own 20-gauge shotgun down from the rafters in his garage and gave it to defendant. Daniel M. wanted revenge. Defendant and Daniel M., along with some other friends, went out looking for Valerio and Alvarado and returned to the place where they had first

encountered them that afternoon. Defendant approached one of the nearby apartments where the Sureños were standing and when the Sureño group recognized defendant and his friends, the Sureños ran away. Someone yelled that security was on its way and a shot rang out. The Norteño group scattered and reunited shortly afterward. When defendant reappeared he was armed with a 12-gauge shotgun that Daniel M. had seen in defendant's possession about a month before. When he first saw defendant with the gun it was unmodified. When defendant produced it on this day it had been sawed off at both ends and was small enough to fit in the pocket of his pants.

The Norteño group gathered at one friend's house, "talking about what happened." They had to leave that place for some reason, so they went out walking instead. This was around 5:00 in the afternoon. The group consisted of defendant, Daniel M., and two or three other friends, one of whom had his dog with him. Soon they encountered a white car in which Daniel S., also known as Donut, was riding, along with some other people affiliated with the Sureño gang. It was known that defendant did not like Daniel S. and wanted to provoke a fight with him. Defendant's group challenged the group in the car by staring angrily at them in a manner known as "mad-dogging." The rival group behaved similarly.

The car drove on and defendant's group walked on to the nearby bicycle path and continued their walk along the path. Soon, Alvarado, Valerio, Daniel S. and Guillermo Virgen came around the corner at the end of the fence that ran along the bicycle path. Both groups greeted each other by throwing their hands in the air, palms facing out. The Sureño group then ran toward the Norteños and fired at them. Defendant crouched down and returned the fire with one round from his 12-gauge shotgun. The Sureños ran away and the Norteños gave chase down the bicycle path. They lost sight of the Sureños at the end of the fence.

As defendant's group was pursuing the Sureños down the bicycle path, they encountered a little boy who had been shot. Daniel M. had seen some little children on

the path just moments before the shooting started but he did not see them during the shooting. He explained that when the Sureño group came running toward the Norteño group, the Sureños passed the children so that the children were behind the Sureños when they began shooting.

Eduardo S., Daniel S.'s brother, was the driver of the white car that had transported the Sureños to the area of the bicycle path. Eduardo and Daniel lived in a house by the bicycle path. A couple of weeks before the shooting, Eduardo and Daniel were playing football in front of their house when they heard defendant's voice and the sound of a spray paint can. The two peeked around the corner and were surprised to see defendant there in their neighborhood, especially since they knew he did not get along with Daniel. Eduardo and Daniel watched defendant spray paint "187 Donut" on the fence that ran along the bicycle path. Eduardo understood the message to be a warning to his brother.

Eduardo's version of the events that occurred on the day of the shooting was similar to Daniel M.'s account. Eduardo had come home from school and received a call from his brother, who told him that he and his friends were having problems with the Norteños. Eduardo drove over to where his brother was and picked up his brother and some other friends. The group soon encountered defendant's group blocking their path, flashing gang signs, calling them scraps, and challenging them to get out of the car. After dropping off some passengers and picking up others, Eduardo drove on with Alvarado, Valerio, Virgen, and Daniel S. in the car. Alvarado had a .38-caliber revolver and Valerio was armed with a rifle. Alvarado and Valerio brought the firearms "[to] escort us back home in case if anything did happen." The group waited a bit to give the Norteños a chance to leave the vicinity. Eduardo then drove toward home and parked his car at the end of the street where it dead-ends with the bicycle path. The four passengers got out. Eduardo soon heard gunfire and his passengers returned. Virgen had been shot in the leg. Seeing no more of the Norteños, they drove away.

2. The Bystanders' Testimony

The eight-year-old victim was identified as Fernando at trial. Fernando testified that he was on the bicycle path returning home, loaded down with paint balls he had just purchased. He recalled that a man with a white dog told him to get out of the way and someone else pushed him or shoved him. As he was running away four people behind him were shooting at someone else. That was when he felt a pain in his back.

Two of the boys who had been playing with Fernando also testified about the shooting. According to one, the children were on the bicycle path between the two groups with the Sureños in front of them and the Norteños behind. The Sureños, who were displaying their firearms, told the boys to get out of the way. The boys tried to run past the group of Sureños but Fernando, with his load of paintballs, could not move fast enough and got shot in the back.

The other friend gave a similar version. He said that the children had been walking along in the same direction as the Norteño group. They passed the Norteños and saw the Sureños approaching from the other direction. At least one of the Sureños pulled out a gun. The children came even with the Sureño group on the bicycle path with the Norteño group behind them. One of the Sureños told the children to get out of the way, so the children ran for cover just before the shots rang out.

3. The Police Investigation

In the course of the investigation the Salinas Police Department searched several residences associated with the individuals who took part in the shooting. Numerous firearms and gang indicia were uncovered. At one residence where defendant was located on the day of the search, investigators found numerous firearms and parts of guns and a box of ammunition. In a child's bedroom, hidden under the bed or in the closet, were a .357 magnum revolver, a .38 revolver, a .22-caliber rifle, an SKS assault rifle, and a 12-gauge pump-action shotgun. All of the guns were loaded. Defendant's loaded, 12-gauge, sawed off shotgun was also found in that bedroom.

4. Expert testimony

Salinas Police Officer Mark Lazzarini testified as an expert in gang issues. Officer Lazzarini testified about the historical rivalry between the Sureño and the Norteño gangs and the indicia associated with each. He also explained, "in the gang subculture, no insult, no matter how small, goes unanswered. And gang members will retaliate against rival gang members for any type of insult that they deem shows disrespect to them." Retaliation often escalates into violence.

Salinas Police Officer Steven Long explained that there was no ballistics evidence in this case because, in the case of a shotgun, the shotgun pellets do not have distinctive markings that can be associated with any particular weapon. He explained that each shotgun round contains anywhere from 9 to 12 pellets.

C. PROCEDURAL BACKGROUND

Defendant was 15 years old at the time of his arrest. He was prosecuted separately from the other men on both sides of the incident who were charged.

The information charged defendant with 11 felony counts. (Counts 1–11.) Counts 1, 3, 5, 7 and 9 charged attempted murder (§§ 187, subd. (a), 664) of five victims: "John Doe" (identified as Fernando at trial) (count 1), Virgen (count 3), Valerio (count 5), Alvarado (count 7), and Daniel S. (count 9). Counts 2, 4, 6, and 8 charged the lesser offense of assault with a firearm as to each of the five victims. (§ 245, subd. (a)(2).) Count 11 charged defendant with active participation in a criminal street gang. (§ 186.22, subd. (a).) Each of the attempted murder counts also carried the allegation that the crime was committed willfully, deliberately, and with premeditation. (§ 664, subd. (a).) Numerous sentence enhancements were also alleged. We shall discuss those in more detail as they relate to defendant's sentencing arguments.

The jury returned a verdict of guilty as to all five attempted murder counts and the street gang count. The jury found the premeditation allegation true as to victims Valerio

and Alvarado (counts 5 and 7), not true as to Fernando (count 1), and could not agree on the question with respect to victims Virgen and Daniel S. (counts 3 and 9).

D. ISSUES

(1) Did the trial court err by instructing the jury in the language of CALJIC Nos. 5.55 (quarrelsome defendant) or 5.56 (mutual combat)?

(2) Was the trial court required to define the phrase, mutual combat?

(3) Was the trial court required to instruct the jury on attempted manslaughter?

(4) Was it reversible error to refuse to instruct the jury on the burden of proof of self-defense?

(5) Was it error to instruct the jury with the unmodified version of CALJIC No. 2.11.5?

(6) Is there sufficient evidence of malice?

(7) Did the court's instructions and other circumstances confuse the jury with respect to the mens rea necessary for conviction of attempted murder?

(8) Is there sufficient evidence to support a conviction of attempted murder count 1?

(9) Did the trial court err in imposing the sentence enhancements?

(10) Did the trial court err under *Blakely*, *supra*, __ U.S. __ [124 S.Ct. 2531] by imposing the aggravated terms for counts 1, 3, and 9?

E. DISCUSSION

1. CALJIC Nos. 5.55 and 5.56

Defendant's theory at trial was that he fired his shotgun in self-defense. It is a recognized principle of law " 'that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault, to create a real or apparent necessity for making a felonious assault.' " (*People v. Hinshaw* (1924) 194 Cal. 1, 26.) Further, section 197, subdivision

3 specifies that a homicide is not justified if the defendant was "engaged in mutual combat."

Under California law it is the duty of the court to instruct on every theory of the case finding support in the evidence. (*People v. Mabry* (1969) 71 Cal.2d 430, 437.) The trial court gave the general self-defense instructions, which were supported by the evidence that the Sureño group fired the first shots. The court also gave instructions in the language of CALJIC Nos. 5.55 and 5.56, which describe the quarrelsome defendant and mutual combat limitations upon the defense.[2] Defendant argues that there is no evidence to support these instructions. We disagree.

After the first confrontation on the day in question defendant obtained a gun and went out and found the Sureños and backed up Daniel M. when he confronted Alvarado. Defendant concedes that at that point he might have been deemed a quarrelsome defendant. He argues, however, that after everyone scattered at the announcement that security was coming, time passed and broke the "proximate nexus" with the earlier confrontation. According to defendant, he and his friends gathered at another house where they "talked and visited" and were merely "taking a walk, going to the park" when the Sureño group ambushed them. In our view, an equally reasonable interpretation of this evidence is that when defendant and his friends gathered to talk and visit, they were

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[2] The court instructed the jury: "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (See CALJIC No. 5.55.) The court also gave the following instruction:

"The right of self-defense is only available to a person who engages in mutual combat if he has done all the following:

"1. He has actually tried, in good faith, to refuse to continue fighting;

"2. He has clearly informed his opponent that he wants to stop fighting;

"3. He has clearly informed his opponent that he has stopped fighting; and

"4. He has given his opponent the opportunity to stop fighting.

"After he has done these four things, he has the right to self-defense if his opponent continues to fight." (See CALJIC No. 5.56, 2004 re-revision.)

planning another confrontation. Indeed, Daniel M. testified that the group had gathered to talk about what had happened and only went out walking because they had to leave the place where they had first gathered. When they went out, they headed for the bicycle path that ran by the house where Eduardo and Daniel S. lived.

Furthermore, there was no lengthy break between any of the confrontations that took place on March 11, 2002. The first confrontation with Alvarado took place around 3:00 or 4:00 in the afternoon. It was only around 5:00 when defendant's group went out for the walk that ended with the shooting. Between the first confrontation and the shooting a few hours later, defendant obtained a weapon from Daniel M.'s house, confronted the Sureños' at the apartment, retrieved his own shotgun, regrouped with his friends, and engaged in a confrontation with the Sureños in the white car. This is sufficient evidence to warrant the quarrelsome defendant and mutual combat instructions.[3]

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[3] In his reply brief, as well as at oral argument, defendant argued that the mutual combat instruction is itself infirm. According to defendant, the infirmity in the instruction is that it failed to give the jury the chance to decide that even if defendant had been engaged in mutual combat, he might avail himself of the justification defense if the cocombatant's conduct was so sudden and perilous that the defendant had no choice but to fire in self-defense. In effect, defendant contends that the instruction should have been amended to add a qualification similar to that included in the 2004 re-revision to CALJIC No. 5.56: "If the other party to the mutual combat responds in a sudden and deadly counterassault, that is, force that is excessive under the circumstance, the party victimized by the sudden excessive force need not attempt to withdraw and may use reasonably necessary force in self-defense." (See also, *People v. Quach* (2004) 116 Cal.App.4th 294; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75, fn. 2.) Defendant did not request any such instruction at trial and did not raise the point in his opening brief. Accordingly, we are not necessarily bound to consider it. (*People v. Senior* (1995) 33 Cal.App.4th 531, 537.) Nevertheless, assuming the proposed amendment is a correct statement of the law and that the trial court had a sua sponte duty to give it, there is insufficient evidence to support it.

On this record, the only basis for a determination that defendant was engaged in mutual combat is the sequence of events preceding the bicycle path incident. Those undisputed events show that the Sureños' conduct was not sudden or unexpected and that (continued)

2. The Definition of Mutual Combat

Defendant argues that the trial court erroneously neglected to define "mutual combat." This contention is meritless. "A court has no sua sponte duty to define terms that are commonly understood by those familiar with the English language, but it does have a duty to define terms that have a technical meaning peculiar to the law. [Citations.]" (*Bland*, *supra*, 28 Cal.4th at p. 334.) "A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning." (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) There is nothing technical about the phrase mutual combat. It has no meaning of which we are aware that is peculiar to the law. The court was not required to supply a definition.

3. Instructions on Attempted Manslaughter

Defendant next argues that the trial court should have instructed the jury sua sponte on the elements of attempted manslaughter. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162.) It is true that the trial court must give instructions on a lesser included offense when there is evidence to support a conviction on the lesser crime. But the duty does not arise whenever there is *any* evidence, no matter how weak, to support the instruction. The duty only arises when the evidence is substantial enough to merit consideration by the jury. That is, the evidence must be such that a reasonable jury could find it persuasive. (*People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.) There is no such evidence here.

Manslaughter differs from murder in that it does not require proof of malice. (See §§ 188, 192.) "[A] defendant who intentionally and unlawfully kills lacks malice only in limited, explicitly defined circumstances: either when the defendant acts in a 'sudden

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the use of firearms was not excessive under the circumstances. Under no version of the facts could a reasonable jury have concluded both that defendant was engaged in mutual combat and that he did not have a chance to withdraw.

quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in 'unreasonable self-defense'--the unreasonable but good faith belief in having to act in self-defense [citations]." (*People v. Barton* (1995) 12 Cal.4th 186, 199.)

The heat of passion theory is applicable when the killer's reason was actually obscured as the result of a strong passion. That is, the act is done without deliberation or reflection. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 163.) The passion aroused can be any violent or intense emotion other than revenge. (*Ibid.*) Defendant's suggestion that the jury might have found he acted in the heat of passion is implausible. There is no evidence that defendant acted under the influence of any violent or intense emotion. In addition, the jury found that two of five attempted murders were willful, deliberate, and premeditated. Since defendant fired only one shot, the jury could not logically or reasonably have concluded that he acted upon preexisting reflection on the one hand but in the heat of passion on the other. Thus, there is no reasonable probability that the failure to instruct on this theory affected the result. (*Id.* at p. 165.)

Nor is there any evidence to support an unreasonable self-defense instruction. Defendant argues that, without an unreasonable self-defense instruction, the jury might have rejected the primary self-defense theory because it found that, although defendant held an actual, good faith belief that there was a need to defend himself and his friends, that belief was unreasonable. Given the fact that the Sureño group indisputably fired first, no reasonable jury could conclude that if defendant believed he needed to defend against an imminent peril that this belief was unreasonable. The court was not bound to instruct on this theory.

4. The Burden of Proof on Self-Defense

Defendant next contends that the trial court erred in refusing to give an instruction that explained that it was the prosecution's burden to prove beyond a reasonable doubt that defendant did not act in self-defense. The Attorney General does not dispute that the

requested instruction was proper but argues only that the error was harmless. We agree that defendant was not prejudiced by the omission.

In *People v. Sanchez* (1947) 30 Cal.2d 560, 571, the trial court erred in refusing the defendant's request to give the following instruction: " 'In a trial for murder it is not necessary for the defendant to establish self-defense by evidence sufficient to satisfy the jury that the self-defense was true, but if the evidence is sufficient to raise a reasonable doubt as to whether the defendant was justified, then he is entitled to an acquittal.' " *People v. Adrian* (1982) 135 Cal.App.3d 335, 340, held that an instruction similar to the one given in *Sanchez* should be given upon request for other assaultive crimes. *Adrian* held that the combination of instructions given in that case served the same purpose so that failure to give the instruction was harmless. (*Id.* at p. 342.) So it is here.

The trial court informed the jury that "in case of a reasonable doubt whether the defendant's guilt is satisfactorily shown, the defendant is entitled to a verdict of not guilty. This presumption places upon the State or the People the burden of proving the defendant guilty beyond a reasonable doubt." The court also gave the circumstantial evidence instructions, which explained that the facts essential to a complete set of circumstances necessary to establish guilt "must be proved beyond a reasonable doubt." The court went on to explain that in order to find defendant guilty of attempted murder, the jury would have to find that he "harbored express malice aforethought, namely, a specific intent to kill, unlawfully, another human being" and that it is "lawful" for a person to defend himself from attack. The trial court reiterated the reasonable doubt burden of proof throughout the list of instructions, and admonished the jury to "[c]onsider the instructions as a whole and each in light of all the others."

This series of instructions effectively informed the jury that the prosecution had the burden to prove beyond a reasonable doubt that the killing was unlawful, that is, that it was not in self-defense. There is no reasonable likelihood the jury could have

understood the instructions as requiring anything less. (See *People v. Kelly* (1992) 1 Cal.4th 495, 525.)

5. CALJIC No. 2.11.5

The trial court instructed the jury in the language of CALJIC No. 2.11.5: "There has been evidence in this case indicating that a person or persons other than the defendant was or may have been involved in the crime for which the defendant is on trial. [¶] There may be reasons why that person or persons is or is not here on trial. Therefore, do not discuss or give any consideration as to why the other person or persons is not being prosecuted in this trial or whether there [*sic*] have been or will be prosecuted."

Defendant contends that although the instruction is proper when there are other potential defendants who are not on trial, the instruction was too broad in this case because it could be viewed as instructing the jury to disregard the criminal liability and underlying motivation of Eduardo and Daniel M., two important prosecution witnesses. Because defendant did not request any limiting instruction, he has waived the error. (*People v. Lang* (1989) 49 Cal.3d 991, 1024.)

In any event, although the challenged instruction should be clarified when an accomplice testifies, the failure to modify the instruction in this case was not prejudicial. There were at least five people other than the two prosecution witnesses to whom the instruction applied. None of these people were witnesses in the case. As to the two witnesses, the jury received the instructions relating to credibility generally, accomplice testimony, and the appropriateness of considering whether the witness is testifying under a negotiated agreement. Defense counsel conducted a thorough cross-examination of both witnesses and referred to the plea agreements in closing argument. In light of all this, a reasonable jury would conclude that, although it could not consider the reasons why any of the other participants were not on trial with defendant, it could consider the plea bargains in assessing the credibility of the two participants who testified.

Accordingly, we find any error in failing to modify CALJIC No. 2.11.5 was harmless. (See *People v. Sully* (1991) 53 Cal.3d 1195, 1219.)

6. Sufficiency of the Evidence of Malice

Defendant's next argument is that because the Sureños unquestionably fired first, the evidence is insufficient to show malice because it shows only that defendant's life and the lives of his friends were in imminent peril and that his act of firing upon the Sureños was legally justified. (*People v. Stone* (1889) 82 Cal. 36, 38-39; § 197.) Again, we disagree.

When a criminal defendant challenges the sufficiency of the evidence to support a conviction, the appellate court decides only whether a reasonable trier of fact could have found that the prosecution sustained its burden of proving guilt beyond a reasonable doubt. (*People v. Arcega* (1982) 32 Cal.3d 504, 518.) In applying this test, the appellate court must presume in support of the judgment the existence of every fact the trier could reasonably have deduced from the evidence. (*People v. Fosselman* (1983) 33 Cal.3d 572, 578.)

In the present case, the jury could have rejected the justification defense based upon a finding that defendant had either provoked the confrontation or that the two groups were engaged in mutual combat. There is ample evidence to support both theories. There was an existing rivalry between the two groups. Defendant kept his shotgun at a residence along with an arsenal of loaded weapons. He painted the "187 Donut" warning on the fence. As described above, the rival groups had been confronting each other all afternoon. Defendant armed himself immediately following the first confrontation and then went out looking for the people who had aimed the gun at his friend. On his third and final walk of the afternoon or early evening, defendant encountered the Sureños in the white car and joined the others in taunting them to get out of the car, presumably to fight. This is sufficient evidence to support the jury's rejection of the justification defense and its implied finding of malice.

7. Attempted Murder Instructions

Defendant contends that the trial court's instructions on the elements of attempted murder left the jury with the erroneous impression that it could find defendant guilty of attempted murder based on a theory of transferred intent. There is merit to this argument.

The theory of "transferred intent" applies where a defendant intends to kill one person and accidentally kills someone else instead. "In such a factual setting, the defendant is deemed as culpable as if he had accomplished what he set out to do." (*People v. Scott* (1996) 14 Cal.4th 544, 546.) But where the unintended victim is merely injured and not killed, the "transferred intent" theory does not apply. (*Bland*, *supra*, 28 Cal.4th at p. 331.)

"Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder--due to transferred intent--if the person were killed. *To be guilty of attempted murder*, *the defendant must intend to kill the alleged victim*, *not someone else*. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Bland*, *supra*, 28 Cal.4th at p. 328, italics added.)

The only way defendant could have been guilty of the attempted murder of an untargeted victim would be if the jury found that he had the concurrent intent to kill anyone who came within the "kill zone" he purposefully created when he fired at his primary targets. (*Bland*, *supra*, 28 Cal.4th at p. 329.) *Bland* explained the kill zone concept this way: " 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity. . . . When the defendant escalate[s] his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in

A's immediate vicinity to ensure A's death.' " (*Id.* at pp. 329-330, quoting *Ford v. State* (1992) 625 A.2d 984, 1000-1001.)

The trial court did not instruct the jury in this kill zone theory. Indeed, such an instruction is not generally required. (See *Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6 [explaining that the kill zone concept is merely a factual inference and not a legal doctrine requiring special jury instructions].) The trial court did instruct the jury in the language of CALJIC No. 8.66, i.e., that in order to prove attempted murder, the jury must find: "1. A direct but ineffectual act was done by one person toward killing another human being; and [¶] 2. The person committing the act harbored express malice aforethought, namely, a specific intent to kill unlawfully, another human being." The court defined malice as "an intention unlawfully to kill a human being."

Defendant argues that the trial court's reference to "another human being" allowed the jury to find him guilty of attempted murder without finding that the act and the intent were directed at the same person. That is, the instructions allowed a conviction by finding a direct act towards killing the nontargeted victim (shooting the gun) coupled with the intent to kill someone else. The Attorney General argues that it is not reasonably likely that the jury was misled into relying upon a transferred intent theory because the court did not instruct and the prosecutor did not argue transferred intent.

Although the jury was not specifically urged to use the doctrine of transferred intent, our review of the record persuades us that there is a "reasonable likelihood" that the jury understood the charge as the defendant asserts. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; and see *People v. Kelly*, *supra*, 1 Cal.4th at p. 525.) Our conclusion is based upon the ambiguity in the instruction, the prosecutor's remarks, which exacerbated that ambiguity, and the jury's questions, which reveal its confusion.

Both in opening statement and closing argument the prosecutor stressed that the jury did not have to find that defendant had the intent to kill a specified person so long as he had the intent to kill another human being. During opening statement, the prosecutor

began discussing intent and was cut short by a defense objection that his argument exceeded the bounds of a proper opening statement. The remark that the jury heard was: "Now, Fernando is a victim in the case, even though no one is contending that this defendant went out and aimed at Fernando and tried to shoot him. The point is, if you intend to kill someone; that is, to commit murder against someone--."

The prosecutor returned to the theme in argument: "Let's think about this business of attempted murder. Now, you know, everyone knows that this defendant did not go to that location with his loaded shotgun attempting personally, thinking I bet there's an eight-year-old boy walking home from playing that I want to kill. That was not his state of mind. Nobody is arguing that. Does that mean he is innocent of this charge? Absolutely not. Think about what it says here. 'Murder is the unlawful killing of a human being with malice aforethought.' And it goes on to say that '[i]n order to prove attempted murder, there has to be a specific intent, unlawfully, to kill another human being.' Now, what does that mean? It means a person. It doesn't mean Fernando. It doesn't mean any particular person. It means an intent to kill a person." In describing malice aforethought, the prosecutor again stressed that the specific intent to kill another human being did not refer to any particular human being.

We recognize that the prosecutor's argument was intended to explain that defendant did not have to know Fernando or any of the other victims personally in order to have the specific intent to kill them. But in common English usage, the phrase "another human being" refers simply to someone other than the perpetrator. Accordingly, the argument can easily be construed as suggesting that so long as defendant had the intent to kill *some* human being, he could be guilty of the attempted murder of any of the victims.

The Attorney General argues that any ambiguity in the instruction was cured by the prosecutor's argument, which explained the concept of concurrent intent. But the only place that explanation appears is in rebuttal: "[H]e intended to kill the people who

were in the group that he was aiming at shooting the gun. He was not checking I.D.'s. He wasn't saying, well, let me see, Sureño stand over there. Innocent bystander, could you stand over there please. We got a wide spread in this shotgun and I don't want you to get hurt. He wanted to kill everyone in the group with his sawed-off shotgun." This argument does not cure the confusion. The reference to "the people who were in the group" is itself ambiguous in that Fernando and the children would not necessarily be considered as the "group" at which defendant was aiming. Furthermore, this single reference in rebuttal is overshadowed by the prosecution's insistence that defendant did not have to intend to kill "Fernando" in order to be guilty of his attempted murder.

The jury's questions show that it was confused on the point. Early in its deliberations, the jury sent the following question: "Is there a law that states something to the effect that if a person is guilty of committing a felony and during that felony an innocent person is hurt, that the person is guilty of attempted murder of the innocent bystander even if there was no intent to kill?" The trial court ascertained that by "felony" the jury was referring to attempted murder, and that the reference to "no intent to kill" referred "specifically & only to the innocent bystander."

Thus clarified, the jury's question is most reasonably read as asking whether, if it found defendant guilty of the attempted murder of one victim, it could also find defendant guilty of the attempted murder of a bystander even if defendant had no intent to kill the bystander. As defendant contends, the simple answer to the question is "no." However, the prosecutor crafted a response taken from *Bland* that described the concept of concurrent intent. Over defendant's objection, the court gave the prosecutor's suggested response, adding a final sentence at defendant's request: "A person's intent to kill one or more persons may concurrently include a bystander, when the nature and scope of the attack, although directed at a primary victim or victims, are such that you, the jurors, conclude the perpetrator intended to ensure death to the primary victim or victims by killing everyone in the primary victim's vicinity. [¶] Nevertheless, the

defendant's guilt of the charge(s) of attempted murder must be judged separately as to each alleged victim." This response does not directly answer the jury's question, which was, may we convict defendant of attempted murder of someone he did not intend to kill.[4] That the jury remained confused on the point is evidenced by its next question.

After resuming deliberations the jury returned with another question relating to intent to kill: "If it's helpful to deliberations, is it appropriate to substitute each individual victim's name in charges 664/187 item 1 & 2 on CALJIC [No.] 8.66 where it says 'human being' so that we could address each count separately?, e.g. 'intent to kill unlawfully XXXX'?" This question focuses upon the very portion of the instruction that defendant claims suggested a transferred intent theory. The jury was asking, in effect, whether the phrase "another human being" referred to the victim alleged in each count or to someone else. The court's response was, "The jury must consider each count separately but it would not be appropriate to substitute any victim's name in place of 'human being' in CALJIC [No.] 8.66 as it applies to Counts 1, 3, 5, 7, 9."

To the trial court's credit, the jury's second question was a difficult question to answer without causing the jury even more confusion. But the court's response merely repeated the explanation that seems to have prompted the question and, rather than insure

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[4] The court's response to the jury's question is similar to what is now included in the pattern instructions as CALJIC No. 8.66.1: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' is an issue to be decided by you." (2004 revision.)

We express no opinion on the correctness of this instruction; but we note that it is more specific than the trial court's explanation here because it directs the jury to decide whether the perpetrator "actually intended to kill the victim."

that the jury understood that defendant had to have intended to kill the individual victim alleged in each count, it could be read as suggesting the opposite.

After the jury moved on to the allegations of premeditation, it sent the court another question: "[A]re we to apply this to the crime by itself" or "to each individual victim." The trial court again asked for clarification and the jury responded: "Does the premeditation enhancement need to be the same for all 5 counts (1, 3, 5, 7, 9) or can we reach a different decision on each count?" The question demonstrates that the jury was still confused about whether it was to apply the elements of the crime or enhancement to the particular victim alleged in each count.

In light of the foregoing, we conclude that the challenged instruction was misleading because it implied that the jury could transfer defendant's intent to kill one or more of the victims to other victims he did not actually intend to kill. Because the jury was erroneously instructed on an element of the offense of attempted murder, reversal of his convictions for this offense is required unless we are able to conclude that the error was harmless beyond a reasonable doubt. (*People v. Hayes* (1990) 52 Cal.3d 577, 628; *People v. Kelly*, *supra*, 1 Cal.4th at p. 527.)

The error was unquestionably harmless as to counts 5 and 7, the attempted murders of Valerio and Alvarado. The jury found these crimes to have been willful, deliberate, and premeditated. The jury could not logically have reached that conclusion without also having found that defendant had the specific intent to kill these particular victims.

The error was also harmless as applied to counts 3 and 9, the attempted murders of Virgen and Daniel S. The evidence compels the finding that defendant had the concurrent intent to kill all four young men in the rival group. Indeed, no reasonable juror could have concluded that defendant had the specific, premeditated intent to kill two

persons in the group but did not have the concurrent intent to kill the other two, when he fired a shotgun at the approaching group of four.[5] We conclude that there is no reasonable doubt that even if the instructions had been clearer, the jury would have returned the same result on counts 3 and 9.

We reach a different conclusion with respect to count 1. Although, as discussed in the following section, the evidence would have been sufficient to support a finding that defendant had the concurrent intent to kill the young boy, the evidence was not overwhelming; and there was evidence that could lead to a contrary finding--testimony that the children had been warned to get out of the way and had passed through the Sureño group and appeared to be out of harm's way before the shooting began. Thus, we are not convinced that the jury would necessarily have made the requisite factual finding. The jury was concerned about the "innocent bystander," a phrase that must have referred to Fernando, the alleged victim in count 1. The jury's questions indicate that at least one member of the jury did not believe that defendant had the intent to kill the child. The court's subsequent instructions did not clarify the point. We conclude that there is a reasonable possibility that more specific instructions would have changed the result on this count. Therefore, the conviction on count 1 must be reversed.

8. Sufficiency of the Evidence of Intent to Kill Fernando

In an argument related to the immediately preceding discussion, defendant contends that there is insufficient evidence that he intended to kill Fernando. On this point we disagree.

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[5] The question of whether a defendant may properly be convicted of two counts of attempted murder for firing a single shot toward two victims on the theory that both victims were within the so-called "kill zone" at the time of the shooting is presently before the Supreme Court in *People v. Smith* (2004) 115 Cal.App.4th 567, review granted May 12, 2004, S123074.

Since it is undisputed that defendant did not primarily intend to kill Fernando, the only way defendant could have been convicted of his attempted murder would be upon a finding of concurrent intent based upon the kill zone concept. (*Bland*, *supra*, 28 Cal.4th at p. 329.) Evidence that would support such a finding in the present case is the fact that defendant used a sawed-off shotgun, which could scatter 9 to 12 pellets with one round. The single round from the shotgun is akin to the hail of bullets that *Bland* used to explain the kill zone concept. (*Ibid.*) One could infer from the fact that defendant had the gun modified in the recent past, that he was aware of these characteristics and chose the particular weapon to maximize the chance of striking his primary target.

There was also evidence from which one could infer that defendant was actually aware of the presence of the children when he fired his gun. Fernando recalled that the Norteño man with the dog told him to get out of the way. Daniel M., who was walking with defendant, saw the children on the bicycle path just before the shooting began. Nearly all of the eyewitnesses described the children as having overtaken and passed defendant's group, placing the children between the two groups immediately before the shooting. The evidence also shows that the shooting took place in an area where one might expect to find children or other passersby. Photographs of the bicycle path show an asphalt trail with fields on one side and an extensive residential neighborhood just behind a wooden fence on the other. The location is not remote or secluded. Defendant's intentional firing of a shotgun in this residential area bolsters the inference that he had the concurrent intent to kill anyone who got in the way.

This evidence is sufficient to support a finding that defendant had the concurrent intent to kill the victim alleged in count 1.

9. Sentencing Issues

a. Summary of the Sentence

Designating count 1 as the primary count, the trial court sentenced defendant to a total of 47 years to life in state prison. The aggregate sentence was calculated as follows:

Counts 1 and 3

(Attempted nonpremeditated murder of Fernando and Virgen) 44 years to life:

- The upper term of nine years for the crime (§ 664, subd. (a));
- 10 years for gang enhancement (§ 186.22, subd. (b)(1)(C));
- 25 years to life for gun-use enhancement (§ 12022.53, subd. (d) (hereafter § 12022.53 (d)).

Counts 5 and 7

(Attempted premeditated murder of Valerio and Alvarado) 45 years to life:

- 15 years to life for the crime (§ 664, subd. (a));
- 20 years for gun-use enhancement (§ 12022.53, subd. (c));
- 10 years for gang enhancement (§ 186.22, subd. (b)(1)(C)).

Count 9

(Attempted nonpremeditated murder of Daniel S.) 39 years:

- The upper term of nine years for the crime (§ 664, subd. (a));
- 20 years for gun-use enhancement (§ 12022.53, subd. (c));
- 10 years for gang enhancement (§ 186.22, subd. (b)(1)(C)).

Count 11

(Participation in a criminal street gang) two years:

- The midterm of two years for the crime (§ 186.22, subd. (a));
- Four years for gun-use enhancement (§ 12022.5, subd. (a)) (stayed per § 654);
- Three years for great bodily injury enhancement (§ 12022.7, subd. (a)) (consecutive to count 1).

All terms were to run concurrent with the term for count 1 except that the three-year enhancement on count 11 was ordered to run consecutive to count 1, making the total term 47 years to life.

b. The Section 12022.7 Enhancement

Based upon the injury to Fernando, the jury found the section 12022.7 enhancement alleged in connection with count 11 to be true. Although the trial court ordered all subordinate terms to run concurrent to the term for count 1, the court separated the section 12022.7 enhancement from count 11 and ordered it to run consecutive to count 1, thus increasing defendant's minimum term to 47 years. This was error. As the Attorney General appropriately concedes, our sentencing structure does not permit separating the felony and its attendant enhancement. (See *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310-1311.)

Defendant also argues that his punishment cannot be enhanced by both a section 12022.7 enhancement and a section 12022.53 (d) enhancement, regardless of the count to which the enhancements are attached. Although we shall reverse the conviction on count 1, since defendant received a second section 12022.53 (d) enhancement, attached to count 3, we must address the argument.

Defendant contends that section 12022.53, subdivision (f), prohibits the imposition of both a section 12022.53 (d) and a section 12022.7 enhancement upon one person. Defendant contends in the alternative that the section 12022.7 enhancement must be stayed pursuant to section 654.[6] We find the latter argument persuasive.

Section 654 provides that where an "act or omission" is punishable by different provisions of law, "in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) Defendant is being punished on count 3 for the attempted murder of Guillermo Virgen. The section 12022.53 (d) enhancement imposed on that count increases the punishment because in the course of committing that felony defendant

[6] Without any discussion of the point, the Attorney General asserts that section 654 does not apply to sentence enhancements. The Supreme Court has yet to explicitly resolve the question. (See *People v. Oates* (2004) 32 Cal.4th 1048, 1066, fn. 7 (*Oates*).)

fired a gun and caused great bodily injury to someone. (§ 12022.53 (d).) In count 11, defendant is being punished for street terrorism and the punishment for that crime is enhanced because in the commission of that felony he caused great bodily injury to someone. (§ 12022.7.) Since the only allegation of great bodily injury the jury found to be true was the injury to Fernando, defendant contends that imposition of both enhancements punishes him twice for the same act.

We find no precedent, nor does the Attorney General direct us to any, that approves multiple sentence enhancements for a single great bodily injury enhancement against a single victim. On the contrary, the court in *People v. Moringlane* (1982) 127 Cal.App.3d 811, 817, expressly held that "section 654 . . . prohibits the imposition of multiple enhancements for the single act of inflicting great bodily injury upon one person." (See also *People v. Alvarez* (1992) 9 Cal.App.4th 121, 127 ["[G]enerally only one enhancement for great bodily injury may be imposed where multiple offenses are committed against a single victim on a single occasion"].)

We recognize that in *Oates*, *supra*, our Supreme Court has recently held that section 654 does not bar the imposition of multiple section 12022.53 (d) enhancements based upon a single great bodily injury. However, *Oates* expressly limited its holding to section 12022.53. (*Oates*, *supra*, 32 Cal.4th at p. 1061, fn. 4.) In the absence of any authority supporting a contrary result, we shall order the trial court to stay imposition of the section 12022.7 enhancement attached to count 11.

c. The Gang Enhancements

As to all of the attempted murder counts, the trial court imposed a 10-year enhancement for acting for the benefit of a criminal street gang, pursuant to section 186.22, subdivision (b)(1)(C). Subdivision (b)(5) of that section provides that if the underlying crime is punishable by imprisonment for life, the defendant shall be ineligible for parole for 15 years. When subdivision (b)(5) applies, subdivision (b)(1)(C) does not. (*People v. Montes* (2003) 31 Cal.4th 350, 360-361.) Defendant contends, and the

Attorney General concedes, that section 186.22, subdivision (b)(5) applies to counts 5 and 7 (attempted, willful, deliberate and premeditated murder of Valerio and Alvarado) because the sentence for those crimes is 15 years to life. (§ 664, subd. (a).) It follows that the 10-year enhancement for counts 5 and 7 must be stricken.

Defendant also argues that the enhancement was improperly imposed on counts 1 and 3 (attempted murder of Fernando and Virgen). But even though the gun use enhancement increases the term for these counts to life, the underlying felony (attempted murder that is not willful, deliberate, and premeditated) carries a determinate term. Since section 186.22, subdivision (b)(5) only applies where the underlying felony provides for a life term (*People v. Montes*, *supra*, 31 Cal.4th at pp. 360-361), the 10-year enhancement was properly imposed on these counts.

d. Blakely Error

Defendant claims that, under *Blakely*, *supra*, __ U.S. __ [124 S.Ct. 2531], he was deprived of his constitutional right to a jury trial when the trial court imposed an upper term sentence for counts 1, 3, and 9, the attempted nonpremeditated murder of Fernando, Virgen, and Daniel S. Since we have concluded that the count 1 conviction must be reversed, we need not reach the *Blakely* issue as it pertains to that count. We reject the argument as to the other two counts.[7]

We begin by summarizing the constitutional issue. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a

[7] We recognize that the question of whether *Blakely* applies to upper term sentencing may be the subject of future clarification by our Supreme Court. The Supreme Court has granted review in two cases involving *Blakely* issues. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

reasonable doubt." This principle, the court explained, derives from two constitutional rights, namely, the right to trial by jury, and the prohibition against depriving a person of liberty without due process of law. (*Id.* at pp. 476-477.) *Blakely* confirmed, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]" (*Blakely*, *supra*, __ U.S. at p. __ [at p. 2537].) It follows that we must first determine the statutory maximum sentence that could have been imposed for counts 3 and 9.

Under California's determinate sentencing law, "[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime." (§ 1170, subd. (b); see also Cal. Rules of Court, rule 4.420(a).)[8] The middle term is the "presumptive" sentence, absent aggravating or mitigating factors warranting imposition of an upper term or lower term sentence, respectively. (*People v. Arauz* (1992) 5 Cal.App.4th 663, 666.)

The choice of terms for attempted, nonpremeditated murder is five, seven, or nine years. (§§ 189, 190, subd. (a), 664, subd. (a).) But as to count 3, the prosecution also pleaded and proved to the jury beyond a reasonable doubt, the facts necessary for application of the section 12022.53 (d) enhancement, which provides a maximum term of life in prison. The statutory maximum for the crime alleged in count 3 is, therefore, life in prison. Defendant's challenge to the nine-year determinate term is, in effect, challenging the minimum term for this crime. *Blakely* does not apply in that case.

The term imposed for count 9, as enhanced, was a determinate term. The midterm for the substantive crime in that count is seven years. But, the upper term becomes the relevant statutory maximum if the jury finds an aggravating factor or if defendant admits

[8] Hereafter, all references to "rules" are to the California Rules of Court.

one. One valid factor in aggravation is sufficient to support the imposition of an upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433- 434.) Rule 4.421(a)(7) contains a nonexclusive list of aggravating factors, among which is: "The defendant was convicted of other crimes for which consecutive sentences could have been imposed but for which concurrent sentences are being imposed."

The trial court imposed the aggravated term on count 9 because it found that defendant was on probation at the time of the crime and that his performance on probation had been unsatisfactory. Neither aggravating fact was the subject of a jury finding or of defendant's admission. However, by finding defendant guilty beyond a reasonable doubt of multiple violent crimes against multiple victims, the jury established an aggravating factor sufficient to increase the statutory maximum penalty to the aggravated term, i.e., the jury convicted defendant of crimes for which defendant could have been sentenced consecutively but for which the court imposed concurrent terms, instead. (Rule 4.421(a)(7).)

The trial court has discretion to impose consecutive sentences when the defendant has been convicted of multiple crimes. Previous decisions have established that multiple victims may be considered a circumstance in support of consecutive sentencing. (See e.g. *People v. Leung* (1992) 5 Cal.App.4th 482, 505; *People v. Gutierrez* (1992) 10 Cal.App.4th 1729, 1739.) Thus, the trial court could have ordered the terms for the attempted murder convictions to run consecutively. That the court exercised its discretion not to impose consecutive sentences on these counts provides an aggravating circumstance, the facts in support of which were found by the jury beyond a reasonable doubt. This single aggravating factor increases the statutory maximum for the crimes carrying determinate term penalties to the greatest of the three terms provided. It follows that the court's decision to impose the upper term for count 9 does not violate *Blakely*.

F. DISPOSITION

The judgment of conviction on count 1 is reversed.

The matter is remanded to the trial court for resentencing on the remaining counts, striking the 10-year enhancements imposed pursuant to Penal Code section 186.22, subdivision (b)(1)(C) on counts 5 and 7, staying the three-year enhancement imposed pursuant to Penal Code section 12022.7, subdivision (a) on count 11, and to reconsider the sentence in light of these modifications.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.